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IN THE

Supreme Court of the United States

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, BELLUR PRABHAKAR, Ph.D., GERALD MOSS, M.D., ELIZABETH HOFFMAN, Ph.D., DAVID C. BROSKI and JAMES J. STUKEL, Ph.D.,

Petitioners,

v.

NAVREET NANDA, Ph.D. and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT NAVREET NANDA, Ph.D.

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STATEMENT OF THE CASE

Respondent, Navreet Nanda, Ph.D., a former assistant professor of immunology in the department of microbiology and immunology at the University of Illinois at Chicago College of Medicine, brought this action against Petitioners, the Board of Trustees of the University of Illinois, her former department head, Bellur Prabhakar, Ph.D., the Dean of the College of Medicine, Gerald Moss, M.D., the former Provost and Vice Chancellor for Academic Affairs, Elizabeth Hoffman, Ph.D., the Chancellor, David Broski, and the President of the University of Illinois, Gerald Stukel, Ph.D., (collectively, "University"), for unlawfully terminating her employment because of her race, (Asian), national origin, (Indian), and her gender. Count I of Nanda's complaint alleged that she had been subjected to harassment and that she was fired on the basis of her race, national origin and sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, ("Title VII"). Count II of the complaint brought a claim under 42 U.S.C. §§ 1983 and 1988 for violation of her right to equal protection and sought injunctive relief, compensatory and punitive damages and attorneys fees. Nanda also brought a claim under Illinois law in Count III of her complaint against Prabhakar for intentional interference with her employment contract with University.

University moved to dismiss Nanda's Title VII action in Count I of the complaint, contending that Congress did not validly abrogate the States' sovereign immunity under the Eleventh Amendment when it extended Title VII to the States in 1972. University also moved to dismiss the § 1983 claim in Count II, and the state law claim in Count III. The District Court denied the University's motion to dismiss Count I, granted the motion to dismiss the § 1983 claims for damages, but denied the motion to dismiss the claims for injunctive relief, and

dismissed the state law action in Count III. The Court of Appeals for the Seventh Circuit affirmed the denial of University's motion to dismiss the Title VII claims, holding that Congress validly exercised its power under § 5 of the Fourteenth Amendment to extend Title VII to the States. The Seventh Circuit also affirmed the District Court's rulings on the § 1983 claims. University's petition for *certiorari* concerns only the Title VII action in Count I.

University contended below *only* that Congress failed to create a sufficient record to support the extension of Title VII to the States. Whether Congress was required to document a pattern of unconstitutional discrimination in state employment before § 5 of the Fourteenth Amendment permitted Congress to make Title VII applicable to the States and if so, whether a sufficient legislative record exists are the only issues that should properly be before this Court. The District Court and the Seventh Circuit correctly rejected the University's claim that a legislative record of a pattern of unlawful employment discrimination was the "*sine qua non*" to upholding the 1972 amendments to Title VII.

As the District Court noted, University's sole argument was that under *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S. Ct. 631, 140 L. Ed. 2d 522 (2000) and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), in order to extend Title VII to the States, Congress had to find a pattern of discrimination in state employment. The District Court began its analysis by noting that *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S. Ct. 2666, 2671, 49 L. Ed. 2d 614 (1976) held that § 5 of the Fourteenth Amendment authorized Congress to make Title VII binding upon the States. In response to University's claim that *Fitzpatrick* did not decide whether the substantive provisions of Title VII were a proper exercise of Congressional authority, the District Court observed that numerous Courts of Appeal have consistently held since

Fitzpatrick that Congress was well within its power to subject the States to Title VII.

The District Court also reasoned it was bound by the Seventh Circuit's opinion in *Varner v. Illinois State University*, 226 F.3d 921 (7th Cir. 2000), *cert. denied*, 533 U.S. 902, 121 S. Ct. 2241 (2001), which upheld the Equal Pay Act ("EPA") against an Eleventh Amendment challenge based on virtually the same argument that University made here against Title VII. In *Varner*, the court noted that *Kimel*, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 119 S. Ct. 2199, 2210, 144 L. Ed. 2d 575 (1999), and *City of Boerne v. Flores*, 521 U.S. 507, 531-32, 117 S. Ct. 2157, 138 L. Ed. 2d 2157 (1997) held that a "lack of support [in the legislative record] is not determinative of the § 5 inquiry". 226 F.3d at 935. Relying on *City of Boerne*, 521 U.S. at 533, the *Varner* court noted that this

> observation is particularly relevant in the context of the Equal Pay Act, where the value of congressional findings is greatly diminished by the fact that the Act prohibits very little constitutional conduct. ... and where the historical record clearly demonstrates that gender discrimination is a problem that is national in scope.

226 F.3d at 935.

The District Court then followed the Eighth Circuit's opinion in *Okruhlik v. University of Arkansas*, 255 F.3d 615 (8th Cir. 2001), which rejected an Eleventh Amendment challenge to Title VII for two reasons. First, the *Okruhlik* court believed that it was bound by *Fitzpatrick*. Secondly, the *Okruhlik* court was not persuaded by the same claim University made in the present case, that *Kimel* and *Garrett* required a different conclusion because Congress supposedly failed to demonstrate

an adequate record of widespread discrimination in state employment. The *Okruhlik* court referred to a report released in 1969 by the U.S. Commission on Civil Rights cited in the Congressional Record, H.R. Rep. No. 92-238 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2152, which concluded that "employment discrimination in State and local governments is *more prevasive* than in the private sector". (emphasis added).

On appeal, the Seventh Circuit rejected the University's claim that *Garrett* established a more stringent test to abrogate Eleventh Amendment immunity by satisfying not only the "congruence and proportionality" test of *City of Boerne*, but also showing clear evidence of constitutional violations in the Congressional record. The *Nanda* court noted that it had previously held, based on *Fitzpatrick*, that there was no Eleventh Amendment immunity to Title VII. However, in light of the statement in *Fitzpatrick* that the substantive provisions of Title VII were not being challenged, and in light of this Court's recent Eleventh Amendment cases, the Seventh Circuit reasoned it was "prudent" to assume that *Fitzpatrick* alone did not control the issue. 303 F.3d 817, 822.

Following *City of Boerne*, *Florida Prepaid*, *Kimel*, and *Garrett*, the Seventh Circuit held that the first step in applying these principles to Title VII was to "identify with some precision the scope of the constitutional right at issue". 303 F.3d at 828. Gender based classifications are subject to a heightened scrutiny such that those who seek to defend a gender based government action must demonstrate an "exceedingly persuasive justification" for that action, citing *United States v. Virginia*, 518 U.S. 515, 531 (1996). Racial classifications are subject to strict scrutiny and can be justified only if they promote a compelling state interest and are narrowly tailored to serve that interest. The burden of proof under Title VII and under the equal protection clause for racial or gender-based discrimination is

identical: a plaintiff must show intentional discrimination. Discriminatory intent can be proven directly, or indirectly, by showing that an employee was a member of a protected class, was meeting her employer's legitimate expectations, and that other, similarly situated workers were treated more favorably. Since the aim of Title VII and the method of proving a violation of that statute are the same as the goal of the equal protection clause and manner of showing a denial of equal protection, Congress did not impermissibly redefine States' obligations under the Fourteenth Amendment when it extended Title VII to the States in the 1972 amendments. 303 F.3d at 829-30.

In light of the fact that Title VII prohibited "little if any constitutional conduct", the court held that the value of Congressional findings is greatly diminished. The court also reaffirmed its conclusion in *Cherry v. University of Wisconsin Sys. Bd. of Regents*, 265 F.3d 541 (7th Cir. 2001), which rejected another Eleventh Amendment challenge to the EPA based on *Garrett*, that *Garrett* had not "established a new, bright-line rule" that Congress' attempt to abrogate Eleventh Amendment immunity is void without specific findings that States had engaged in a pattern of unconstitutional conduct. The court explained that *Garrett* held only that the legislative record was important "where the statute in question pervasively prohibits *constitutional* State action". 303 F.3d at 828. (emphasis added).

To the extent that a Congressional record was a factor to consider, the Seventh Circuit held that the legislative record contained ample evidence that Congress was responding to a pattern of discrimination by the States, citing two comprehensive studies of racial and national origin discrimination, one of which specifically addressed the problem of discrimination in academia. The court also noted that Congress became familiar with the problems of race and national origin discrimination in enacting the Civil Rights Act of 1964, in considering the Equal

Rights Amendment, and in enacting the Educational Opportunity Act. Relying on *Fullilove v. Kluznick*, 448 U.S. 448, 503 (1980), the Seventh Circuit reasoned that such familiarity with the problem of racial, national origin and gender discrimination "reduc[ed] the need for fresh hearings and prolonged debates". The court then held that, particularly in light of "the well documented history of gender and race discrimination in this Nation, a history that is embodied in the Supreme Court's own jurisprudence", the Congressional record supported the 1972 amendments to Title VII. 303 F.3d at 831. Finally, the court noted that the Eight Circuit in *Okruhlik* followed a similar analysis in upholding Title VII against an Eleventh Amendment challenge.

REASONS FOR DENYING THE PETITION

University contends that this Court should now answer the question it supposedly reserved for future judgment in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 n.11, 96 S. Ct. 2666, 2671, 49 L. Ed. 2d 614 (1976): whether Congress properly abrogated the States' Eleventh Amendment immunity to suit under Title VII. Petitioners ignore the fact that *Fitzpatrick* squarely held that § 5 of the Fourteenth Amendment gave Congress the power to abrogate the States' Eleventh Amendment immunity to the extent that Congress could render States subject to the back pay and attorney fee awards authorized by Title VII. This Court recognized that the back pay and attorney fee provisions of Title VII were "appropriate legislation [under § 5] for the purpose of enforcing the provisions of the 14th Amendment". 427 U.S. at 456, 96 S. Ct. at 2671. This holding has been repeatedly reaffirmed in almost every Eleventh Amendment case that this Court has decided since *Fitzpatrick*. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59, 116 S. Ct. 1114, 1125, 134 L. Ed. 2d 252 (1996); *Florida Prepaid*

Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 636-37, 119 S. Ct. 2199, 2210, 144 L. Ed. 2d 575 (1999); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 80, 120 S. Ct. 63, 140 L. Ed. 2d 522 (2000); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

University attempts to gain milage from this Court's statement in a footnote in *Fitzpatrick* that the state officials in that case did not argue that the substantive provisions of Title VII were not a proper exercise of Congressional power under § 5 of the Fourteenth Amendment. However, nothing in *Fitzpatrick* purported to suggest that even though § 5 of the Fourteenth Amendment authorized Congress to subject States to liability for back pay and attorney fee awards under Title VII, Congress was powerless to extend the substantive provisions of Title VII to the States. How can States be subject to back pay and attorney fee awards authorized by Title VII unless States are bound by Title VII's substantive requirements?

University is asking this Court to either accept the anomalous, inconsistent and constitutionally repugnant result, that States are liable for back pay and attorneys' fees under Title VII, but are not bound by that statute's substantive provisions, or overrule *Fitzpatrick*. What University seeks is truly frightening. It is dangerous. It would undo everything this country did to remedy its shameful, three-hundred year history of discrimination based on race, national origin, and gender, progress that was made only after painful decades of demonstrations and riots in the streets. As this Court recognized in *Fitzpatrick*, there can be no legislation that is more "appropriate" to enforce the Fourteenth Amendment's guarantee of equal protection of the law than the prevention of discrimination in employment on the basis of race, color, national origin, religion and gender. If this Court grants *certiorari* and holds that Congress exceeded its power under § 5 of the

Fourteenth Amendment by extending Title VII to the States, this Court will tear the very heart out of the Fourteenth Amendment. The guarantee of equal protection will become illusory and meaningless. This Court must not allow this to happen.

University also claims the Seventh Circuit's decision "facilitates continued assaults against the dignity of States as sovereign entities" and ignores "the sacred compact by which all citizens agreed to be governed, and at the same time undermined the very constitutional framework that permits social problems such as discrimination to be peacefully resolved". (Petition, p. 18) Understandably absent from University's petition is any explanation of how recognizing an Eleventh Amendment immunity to Title VII to enable States to discriminate against their employees on the basis of race, color, national origin, religion or gender in hiring and firing, furthers the peaceful resolution of social problems such as discrimination. It should be obvious that conferring immunity upon States to engage in such conduct does not resolve discrimination; it encourages and perpetuates discrimination. University is also asking this Court to ignore the "continued assaults against the dignity" of State employees that an Eleventh Amendment immunity to Title VII would allow States to perpetrate.

The "constitutional framework" that would be undermined by granting the University's petition is the very fabric of the Fourteenth Amendment itself, because States would then be free to deny equal protection and due process to their employees. While States may be co-equal sovereigns with the Federal government in some respects, State sovereignty does not mean, and has never meant, that States can deny their employees the rights guaranteed them under the Constitution of the United

States. As this Court explained in *Alden v. Maine*, 527 U.S. 706, 754-55, 119 S. Ct. 2240, 2266, 144 L. Ed. 2d 636 (1999):

> "The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statues that comport with the constitutional design."

Fitzpatrick, 427 U.S. at 456 ("Eleventh Amendment and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . . [T]he substantive provisions of the Fourteenth Amendment . . . embody significant limitations on state authority"). This Court should not now hold that the "dignity" of a State's sovereign status requires that State employees surrender their constitutional rights upon accepting State employment.

University further argues that Title VII litigation "will continue to both undercut the careful balance between federal and state power established by the constitution and unnecessarily drain these States' treasuries . . . [and] places an unconstitutional burden on these States' hiring and firing practices". (Petition, p. 11). University fails to appreciate that the balance of Federal and State power was altered *with the full consent of the States* when they ratified the Fourteenth Amendment. *Fitzpatrick*, 427 U.S. at 454, citing *Ex parte State of Virginia*, 100 U.S. 339, 345-48, 25 L. Ed. 2d 676 (1880) ("[E]nforcement [of the prohibitions of the Fourteenth Amendment] is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact"). It is more

than a little offensive for University to consider a prohibition against discrimination in employment on the basis of race, national origin or gender as a "burden". The guarantee of equal protection is instead one of the blessings of our system of government. If there is a "burden" on State treasuries or "burden" on State employment practices by the Fourteenth Amendment's guarantee of equal protection, it is the "price" the States agreed to pay when they adopted the Fourteenth Amendment.

University also asserts that *certiorari* should be granted because the Seventh Circuit's decision was contrary to the decisions of five other circuit courts, as well as in violation of this Court's Eleventh Amendment jurisprudence. In point of fact, however, no court has ever held that Congress exceeded its authority in extending Title VII to the States. Every case University cites concerns whether Congress properly abrogated States' immunity to the Family Medical Leave Act, ("FMLA"), not Title VII. Decisions relating to the FMLA are irrelevant to Title VII because unlike Title VII, the FMLA does not on its face prohibit discrimination on the basis of race, national origin or gender.

Nanda also comports with this Court's Eleventh Amendment decisions. This Court recently *twice declined to grant certiorari* to determine whether there is an Eleventh Amendment immunity to Title VII. First, in *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 2000), *cert. denied*, 531 U.S. 1052, 121 S. Ct. 657 (2000), which relied on *Fitzpatrick* to sustain Title VII, and, more recently in *Maitland v. University of Minnesota*, 260 F.3d 959 (8th Cir. 2001), *cert. denied*, __U.S. __, 122 S. Ct. 1300, 152 L. Ed. 2d 212 (2002), which upheld Title VII against the same arguments based on *Kimel* and *Garrett* that University makes here. *Maitland* reaffirmed the Eighth Circuit's decision in *Okruhlik v. University of Arkansas*, 255 F.3d 615 (8th Cir. 2001), which the Seventh Circuit cited with approval in *Nanda*.

This Court also declined to grant *certiorari* in *Varner v. Illinois State University*, 226 F.3d 921 (7th Cir. 2000), *cert. denied*, 533 U.S. 902, 121 S. Ct. 2241 (2001), which rejected the identical contention with respect to the EPA. This Court's denial of *certiorari* in *Varner* is particularly important because this Court earlier vacated the Seventh Circuit's initial opinion upholding the EPA and remanded with directions to reconsider that decision in light of its opinion in *Kimel*. 120 S. Ct. 928, 145 L. Ed. 2d 806 (2000). This Court's decisions to refuse *certiorari* after the Seventh Circuit held that *Kimel* did not require that it change its holding in *Varner* and to decline to hear *Maitland* and *Johnson*, strongly suggests that this Court agrees with way the Courts of Appeal have applied *Kimel* and *Garrett* to Title VII. There is nothing new in the Seventh Circuit's opinion in *Nanda* that requires this Court's intervention. For all of these reasons, University's petition should be denied.

I. There Is No Conflict Among The Courts Of Appeal Over Whether Congress Properly Abrogated The States' Eleventh Amendment Immunity In Enacting The 1972 Amendments To Title VII.

University argues that this Court should hear this case to resolve a "conflict" among the Courts of Appeal between the decision in *Nanda*, and decisions of the First, Third, Fourth, Fifth and Eleventh Circuits, that have held that Congress exceeded its power under § 5 of the Fourteenth Amendment in extending the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601, *et seq.*, to the States. This contention is without merit for three reasons. First, none of the cases discussing the FMLA even mentioned Title VII. The University ignores the fact that every court that has considered whether Congress properly abrogated the States' sovereign immunity in enacting the 1972 amendments to Title VII has rejected any claim that States were not subject to Title VII. Second, the only conflict among the

Courts of Appeal that exists does not relate to Title VII, but concerns the FMLA. *Hibbs v. Department of Human Resources*, 273 F.3d 844 (9th Cir. 2001), which University does not cite, and *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000), reached opposite results on whether § 2612(a)(1)(C) of the FMLA, which provides for leave to care for sick family members, can be applied to the States. This Court has already granted *certiorari* in *Hibbs* to resolve this dispute and is scheduled to hear argument this month. Third, even if the FMLA cases were relevant, these decisions fit comfortably with the Seventh Circuit's analysis of Title VII in *Nanda* and with this Court's Eleventh Amendment cases.

There is an unbroken line of decisions holding the 1972 amendments to Title VII were a proper exercise of Congress' power under § 5 of the Fourteenth Amendment. *Jones v. Washington Metropolitan Area Transit Auth.*, 205 F.3d 428, 434 (D.C. Cir. 2000) (relying on *Fitzpatrick*); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3d Cir. 1996); *Ussery v. Lousiana*, 150 F.3d 431, 434-35 (5th Cir. 1998), *cert. denied pursuant to Rule 46.1*, 526 U.S. 1013, 119 S. Ct. 1161 (1999) (relying on *Fitzpatrick*); *Johnson v. University of Cincinnati*, 215 F.3d 561, 571 (6th Cir. 2000), *cert. denied*, 531 U.S. 1052, 121 S. Ct. 657 (2000) (citing *Fitzpatrick*); *Holman v. State of Indiana*, 211 F.3d 399 (7th Cir. 2000) (citing *Fitzpatrick*); *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998), *vacated in part on other grounds*, 165 F.3d 593, 594 (7th Cir. 1999); *Merheb v. Illinois Toll Highway Auth.*, 267 F.3d 710 (7th Cir. 2001) (citing *Fitzpatrick*); *Winbush v. Iowa*, 66 F.3d 1471 (8th Cir. 1995); *Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985); *Okruhlik v. University of Arkansas*, 255 F.3d 615 (8th Cir. 2001) (rejecting contention that under *Kimel* and *Garrett* there was an inadequate legislative record to support Title VII); *Maitland v. University of Minnesota*, 260 F.3d 959 (8th Cir. 2001), *cert. denied*, __ U.S. __, 122

S. Ct. 1300, 152 L. Ed. 2d 212 (2002) (same); *Warren v. Prejean*, 301 F.3d 893 (8th Cir. 2002) (same); *Cerrato v. San Francisco Cmty. College Dist.*, 26 F.3d 968 (9th Cir. 1994) (citing *Fitzpatrick*); *In re Employment Discrimination Litigation Against the State of Alabama*, 198 F.3d 1305, 1322-23 (11th Cir. 1999) (disparate impact provision of Title VII was "congruent and proportional" to Fourteenth Amendment under *City of Boerne*). *Nanda* is merely the latest in a long line of cases to reach the same result. University does not contend that any of these cases were wrongly decided. Indeed, University does not discuss them at all. No "conflict" exists that this Court needs to resolve.

The other cases University cites, *Chittister v. Dept. of Comm. & Econ. Dev.*, 226 F.3d 223 (3d Cir. 2000); *Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001), *cert. denied*, __ U.S. __, 122 S. Ct. 812, 151 L. Ed. 2d 812 (2002) and *Laro v. New Hampshire*, 259 F.3d 1 (1st Cir. 2001), are irrelevant to any analysis of Title VII because they all concerned § 2612(a)(1)(D) of the FMLA, which provides for leave for ones' own illness. There is nothing about requiring leave for one's own sickness that directly or indirectly implicates the equal protection concerns of discrimination based on race, national origin or gender that are the heart and soul of Title VII. *Hibbs* upheld a different subsection of the FMLA, § 2612(a)(1)(C), than was involved in the cases University cites. Subsection (C) requires leave to care for sick family members. The *Hibbs* court upheld subsection (C) because it concluded that leave to care for sick family members was intended to alleviate gender discrimination. Significantly, *Hibbs* distinguished the cases the University cites by noting that the section of the FMLA at issue in the those cases, requiring leave for one's own illness, cannot be plausibly justified as an attempt to remedy gender discrimination. 273 F.3d at 850-51. Accordingly, the cases University cites are irrelevant to any analysis of Title VII.

Moreover, there is nothing in the decisions upon which University relies that conflicts with *Nanda*. In particular, none of these cases hold that there must be "actual constitutional violations by the States" (Petition, p. 10) in the Congressional record before Eleventh Amendment immunity can be validly abrogated.

Kazmier recognized that "Congress' exercise of its § 5 power is always authorized when enacting strictly remedial legislation that narrowly targets clearly *un*constitutional State conduct." 225 F.3d at 524 (emphasis in original). *Kazmier* also agreed with *Nanda* that it is only where the statue in question attempts to restrain a State from engaging in *constitutionally permissible* conduct that Congress must justify the need to do so in the legislative record. However, the court held that if the statute was "solely remedial in nature, the absence of constitutional violations [in the Congressional record] might not present a problem." 225 F.3d at 524-25.

For the court, subsection (C) of the FMLA was not remedial, but was "broad prophylactic legislation" because there was no constitutional right to leave to attend to sick family members and thus that statute could not be identified with any constitutional violations to which it could be congruent and proportional. *Kazmier* looked to the Congressional record *only* because it reasoned that the FMLA prohibited substantially more state employment practices than would likely be held unconstitutional under a rational basis analysis. For this reason, the FMLA could be justified only if it was congruent and proportional to actual, identified constitutional violations by States. 225 F.3d at 526. As *Nanda* recognized, however, Title VII prohibits little, if any, unconstitutional conduct. Certainly, University does not contend Title VII outlaws otherwise constitutionally permissible conduct by States. Thus, Title VII is remedial because it is directed only at unconstitutional conduct

and the purported lack of support in the Congressional record, in the language of *Kazmier*, does "not present a problem". 225 F.3d at 524-25.

Lizzi followed a similar approach, reasoning that the FMLA was not narrowly tailored to addressing equal protection violations because the statute was violated *without any* showing that an equal protection violation had occurred. For this reason, *Lizzi* concluded that the FMLA was an improper attempt to redefine States' obligations under the Fourteenth Amendment, rather than remedying an existing constitutional violation. The court therefore held that because there was no constitutional entitlement to sick leave, the FMLA was out of proportion to any remedial purpose. 255 F.3d at 135. Again, because there is a well-established equal protection right to be free from intentional racial, national origin and gender based discrimination, Title VII does not involve these concerns.

Laro also supports the Seventh Circuit's decision in *Nanda*. *Laro* distinguished the FMLA, which it felt did not directly address gender discrimination, from the Equal Pay Act, which "facially targets gender discrimination and therefore validly abrogates states' Eleventh Amendment immunity", citing *Hundermark v. Florida Dept. of Transp.*, 203 F.3d 1272, 1276 (11th Cir. 2000). 259 F.3d at 10. *Laro* therefore recognizes that statues like Title VII, that by their plain language target gender discrimination, are "appropriate legislation" under § 5 of the Fourteenth Amendment.

Laro further supports *Nanda* because *Laro* agreed that there was no need to look to the Congressional record "where the constitutional wrong is otherwise evident", citing *Florida Prepaid*, *City of Boerne*, and *Kimel*. 259 F.3d at 9 n.4. The court examined the legislative record *solely* because the FMLA provision for personal medical leave, unlike the EPA, (and Title

VII) has no direct connection to preventing unconstitutional gender-based discrimination. 259 F.3d at 16. The FMLA cases therefore do not show that *Nanda* was wrongly decided.

II. There Is No Presumption That States Act At All Times Consistent With The Fourteenth Amendment That Must Be Overcome By Findings In The Congressional Record. On The Contrary, When States Classify On The Basis Of Race, National Origin Or Gender, They Are Presumed To Act In Violation Of The Equal Protection Clause.

University repeatedly asserts that the Seventh Circuit erroneously failed to acknowledge a "presumption" that States always act in accordance with the requirements of the Fourteenth Amendment. University then contends that the Eleventh Amendment demands an explicit and detailed Congressional record of discriminatory conduct by the States before this alleged presumption can be overcome and a State's Eleventh Amendment immunity abrogated . University never contended in the District Court or in the Seventh Circuit that such a presumption existed or must be rebutted before Congress' power under § 5 of the Fourteenth Amendment may properly be exercised. This alleged "presumption" is a fiction University created for the first time in its petition to this Court. Neither the District Court nor the Seventh Circuit addressed this contention for the simple reason that the University never raised it. Accordingly, University should not be permitted to make this argument in this Court. *Sprietsma v. Mercury Marine*, __U.S. __, 123 S. Ct. 518, 522-23 n.4 (2002) (Claim that Federal maritime law governed boating accident waived because not raised in lower courts); *TRW, Inc. v. Andrews*, 534 U.S. 19, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339 (2001) (Alternative argument for when "liability arises" under Fair Credit Reporting Act not considered because not raised or briefed below).

In the event this Court elects to consider this claim, this Court should squarely reject any such presumption. University's assertion that this Court supposedly recognized a presumption in *Garrett* that States never act in violation of the Fourteenth Amendment is an inaccurate distortion of that decision. University's argument is based upon a passage from the concurring opinion in *Garrett*, 531 U.S. at 375, set forth at page pp. 16-17 in University's petition. Far from recognizing a presumption that States always act constitutionally, all the concurring opinion did was state that there can be no *converse* presumption that States act *un*constitutionally: "It is a question of quite a different order, however, to say that States in their official capacities . . . must be held in violation of the Constitution on the assumption that they embody the misconceived or malicious perceptions of some of their citizens." It does not at all logically follow that simply because it may be unfair to assume that States invariably embody the unconstitutional attitudes of some of their citizens, that States are presumed to always follow the Constitution. Certainly, the concurring justices in *Garrett* never purported to so state.

University's argument also ignores the context in which the concurring justices in *Garrett* made the comments on which University relies. The passage cited by University was an effort to explain that the major problem with the ADA was that it the statute was violated even if there was no intent to discriminate on the basis of disability, without any showing that States had engaged in a pattern of unconstitutional discrimination against the disabled:

> It is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens

> the equal protection of the laws, particularly where the accusation is *based not on hostility*, but instead on *the failure to act or the omission to remedy*. . . . The failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the *purposeful and intentional action required to make out a violation of the equal protection clause.*

(Emphasis added). 531 U.S. at 375.

Where, however, a State classifies on the basis of race, national origin, or gender, as is outlawed by Title VII, a State has gone far beyond the failure to change policies that are now understood as incorrect under a more enlightened view of proper policy. Instead, such discrimination is the very "purposeful and intentional action required to make out a violation of the equal protection clause" that the *Garrett* concurring justices found wanting in the ADA. Thus, it is illogical to attempt to apply what the concurring justices wrote in *Garrett* about the ADA, to Title VII.

There never has been any presumption that States never discriminate when States make distinctions on the basis of race, national origin or gender. Indeed, this Court has held time and time again that when a State classifies on these bases, the only presumption that exists is that such action is *unconstitutional*. *Kimel* held that this was particularly true in the Eleventh Amendment context:

> "Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are *deemed to reflect prejudice and antipathy*". . . . Older persons, again, unlike those who suffer discrimination on the basis of race or

> gender, have not been subjected to a history of purposeful unequal treatment.

528 U.S. at 83 (emphasis added; internal quotation marks omitted). *See also, Pamore v. Sidoti*, 466 U.S. 429 (1984) (Racial classification is constitutional only if there is a compelling state interest and the racial classification is narrowly tailored to accomplish that interest.); *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (Heightened scrutiny for gender); *J.E.B. v. Alabama* 511, U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (Those seeking to justify gender based classification must demonstrate an "exceedingly persuasive justification").

The other cases upon which University relies either have nothing to do with Congress' power under § 5 of the Fourteenth Amendment, or do not support its position. Certainly, none of these cases purport to hold that State employment decisions on the basis of race, national origin or gender are presumed constitutional.

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) does not support University's position because that case held only that Congress lacked authority under the commerce clause to abrogate a State's Eleventh Amendment immunity. The scope of the commerce clause is not at issue in the present case. More importantly, *Seminole Tribe* reaffirmed the basic holding of *Fitzpatrick*, that the back pay and attorney fee provisions of Title VII could be enforced against the States. 517 U.S. at 59.

The discussion of State sovereignty by University, at pp. 13-16 of its petition, based on *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 122 S. Ct. 1864 (2002) and *Prinz v. United States*, 521 U.S. 898 (1997), is also irrelevant to this case because neither *Federal Maritime* nor *Prinz* concerned the scope of Congress' power under § 5 of the

Fourteenth Amendment. *Federal Maritime* dealt with the narrow issue of whether hearings before an administrative law judge qualified as the type of judicial proceeding to which the Eleventh Amendment applied. *Prinz* was not an Eleventh Amendment case at all, but held that the temporary provisions of the Brady Handgun Violence Protection Act were an impermissible extension of the commerce clause to the inner workings of State government.

Title VII raises different concerns about the proper relationship between the Federal government and the States than those that motivated this Court in *Federal Maritime* and *Prinz* because unlike these cases, Title VII directly implicates the Fourteenth Amendment's guarantee of equal protection. What may be true about the proper relationship between the States and the Federal government with respect to the commerce clause has no application to the Fourteenth Amendment, where the States expressly agreed to surrender sovereign immunity to the Federal government and to grant Congress the corresponding power to regulate the States' conduct to enforce the rights secured by § 1of that Amendment.

For these reasons, there is no "presumption" that States act constitutionally in classifying on the basis of race, national origin or gender that must be rebutted by detailed and explicit findings in the Congressional record before Congress can validly abrogate a State's Eleventh Amendment immunity. On the contrary, this Court has repeatedly held that because of the heightened scrutiny applicable to classifications based on race, national origin or gender, and the well-documented national history of unlawful discrimination on these bases, there is little, if any, requirement that Congress make explicit findings in the record when enacting laws to prohibit such discrimination in order to properly invoke its powers under § 5 of the Fourteenth Amendment. *Nanda* properly followed these decisions. University's petition should therefore be denied.

III. Title VII Is Congruent And Proportional To The Equal Protection Clause And Therefore Congress Was Not Required To Amass An Extensive And Detailed Congressional Record Of Discrimination Before It Could Abrogate States' Eleventh Amendment Immunity. To The Extent Such A Record May Be Relevant, There Is More Than Ample Evidence In The Congressional Record To Support Applying Title VII To The States.

University argues that Title VII is not congruent or proportional to the Fourteenth Amendment injury it is designed to prevent because Congress purportedly did not identify an adequate history of discrimination in State employment. This contention should be rejected because it is the scope of the constitutional right at issue that determines if a statute is congruent and proportional to the injury it is intended to remedy, not the state of the Congressional record. The legislative record comes into play, if at all, *only* if the statute attempts to prohibit substantially more state employment decisions and practices than would be held unconstitutional under the applicable equal protection standard of review.

This Court explained in *City of Boerne* that although Congress is authorized by § 5 to enforce the Fourteenth Amendment by prohibiting conduct which is not itself unconstitutional, Congress does not have the power to decree the substance of the Fourteenth Amendment's restrictions on the States. If a statute is congruent and proportional to the injury to be prevented or remedied and the means adopted to that end, it is a proper exercise of Congress' power to enforce the Fourteenth Amendment. "Lacking such a connection, legislation may become substantive in operation and effect." 521 U.S. at 519. The Religious Freedom and Restoration Act ("RFRA") at issue in *City of Boerne* could not satisfy this test because that

statue prohibited "official actions of almost every description and regardless of subject matter" simply because there was an incidental impact on the practice of religion. 521 U.S. at 532. Although this Court noted that the RFRA's legislative record "lacked examples of modern instances of generally applicable laws passed because of religious bigotry", it plainly rejected the contention University now makes that the state of the Congressional record determines whether a statute is congruent and proportional and thus a valid abrogation of States' rights under the Eleventh Amendment:

> This lack of support in the legislative record, however, is not RFRA's most serious shortcoming. **Judicial deference, in most cases, is based not on the state of the legislative record Congress complies**, but on due regard for the decision of the body constitutionally appointed to decide. (Citation omitted). As a general matter, it is for Congress to determine the method by which it will reach a decision.
>
> **Regardless of the state of the legislative record,** RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. . . . Remedial legislation under § 5 should be adapted to the mischief or wrong which the 14th Amendment was intended to provide against.

521 U.S. at 531-32 (emphasis added; internal quotation marks and brackets deleted).

In *Florida Prepaid*, this Court followed *City of Boerne*, noting that any Eleventh Amendment analysis requires that "we . . . first identify the Fourteenth Amendment "evil" or "wrong" that Congress intended to remedy, . . . with reference to the historical experience . . . it reflects". 527 U.S. at 639-40. This Court reasoned that although Congress could legitimately legislate against the deprivation of a patent under the due process clause, the Patent Remedy Act was not congruent or proportional because it prohibited State conduct that did not violate the constitution:

> Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed. Nor did it make any attempt to confine the reach of the Act by limiting the remedy to certain types of infringement, such as nonnegligent infringement or infringement authorized pursuant to state policy; or providing for suits only against States with questionable remedies or a high incidence of infringement.

527 U.S. at 646-47.

As to the role of Congressional findings, this Court reiterated its holding in *City of Boerne* that:

> **the lack of support in the legislative record is not determinative**. . . . [I]dentifying the targeted constitutional wrong or evil is still a **critical** part of our § 5 calculus because strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

527 U.S. at 646 (internal quotation marks deleted) (emphasis added).

In *Kimel*, the scope of the constitutional right implicated by a statute again was determinative, instead of the legislative record. State classifications based on age in the ADEA were subject to a rational basis scrutiny, which meant that governmental decisions based on age did not violate the equal protection clause unless they were irrational. The ADEA attempted to prohibit much more conduct by States than would otherwise have been constitutional because the statute penalized rational State actions on the basis of age. In language foreshadowing the Seventh Circuit's analysis in *Nanda*, this Court contrasted the ADEA with governmental classifications based on race or gender, which are *never* permissible under the equal protection clause even if there is a rational basis for such action. 528 U.S. at 83. It was for this reason that the ADEA was not congruent or proportional:

> Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. . . . The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection rational basis standard.

120 S. Ct. at 647 (internal quotation marks omitted).

This Court recognized that Congress had the power under § 5 to enact "reasonably prophylactic legislation" to remedy "difficult and intractable problems". 120 S. Ct. at 648. *Kimel* then examined the legislative record *only* because the ADEA could still be a valid exercise of Congress' § 5 power, as long

as the exercise of that authority was necessary to combat unconstitutional State conduct:

> Our task is to determine whether the ADEA is in fact just such an appropriate remedy or, instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination. **One means** by which we have made such determination in the past is by examining the legislative record containing the reasons for Congress' action. . . . Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to perhaps an inconsequential problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of a constitutional violation.
>
> * * *
>
> **Although that lack of support is not determinative of the § 5 inquiry**, . . . Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field".

120 S. Ct. at 648-50 (emphasis added; internal quotation marks deleted).

The Seventh Circuit properly recognized that nothing in *Garrett* purported to retreat from what this Court said in *City of Boerne*, *Florida Prepaid*, or *Kimel* to create a "bright-line" rule that Congress must create a detailed and extensive record before it can properly exercise its § 5 power. After reaffirming the basic

holding of *Fitzpatrick*, this Court in *Garrett* again looked first to the nature of the constitutional right at issue. Classifications based on disability were subject to a rational basis scrutiny. The ADA prohibited State actions based on disability even though they might rationally further legitimate State purposes, and outlawed even unintentional discrimination. For this reason, the ADA made otherwise constitutional State conduct illegal. Thus, the ADA could be a valid exercise of Congress' § 5 power only if Congress could identify a history and pattern of unconstitutional discrimination on the basis of disability to justify broad, prophylactic legislation. The ADA failed because without an adequate legislative record of unconstitutional conduct by States, the ADA impermissibly redefined States' obligations under the equal protection clause.

Most importantly, this Court made it clear that no legislative record in the world could save a statute that was out of proportion to any unconstitutional conduct that might be targeted by the statute:

> Even if it were possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States, the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*. . . . The Act also makes it the employer's duty to prove that it would suffer [an undue] burden, instead of requiring (as the constitution does) that the complaining party negate the reasonable bases for the employer's decision.

531 U.S. at 372.

For these reasons, University is simply wrong in its claim that Title VII is not remedial because there supposedly is no legislative history of discrimination by the States on the basis of race, national origin or gender. Rather, the Seventh Circuit correctly followed this Court's decisions by determining whether Title VII was congruent and proportional and therefore remedial by looking to whether Title VII attempted to prohibit more State action than would otherwise be permissible under the equal protection clause. No Fourteenth Amendment right has a stricter standard of protection than classifications based on race or national origin. Racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. *Kimel*, 120 S. Ct. at 646. This Court has "continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *City of Boerne*, 521 U.S. at 526. States may make distinctions based on gender only if there is an "exceedingly persuasive" justification. *United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). The Seventh Circuit therefore properly recognized that unlike classifications based on age or disability, State actions based on race, national origin or gender *never* comply with the equal protection clause, even if there is a rational basis for them. *Nanda* also correctly reasoned that since Title VII and the equal protection clause both require proof of intentional discrimination, Title VII prohibits little, if any, constitutional State conduct. Title VII therefore is congruent and proportional to the Fourteenth Amendment and is, as this Court recognized in *Fitzpatrick*, "appropriate legislation" under § 5 to enforce the Fourteenth Amendment.

Because Title VII satisfies the "critical part of the § 5 calculus", *City of Boerne*, 527 U.S. 646, the Seventh Circuit's holding that "the value of Congressional findings is greatly diminished", *Nanda*, 303 F.3d at 830, comports with *City of Boerne*, *Florida Prepaid*, *Kimel* and *Garrett*. Nevertheless, to the extent that the legislative record may be important, the Seventh Circuit correctly recognized that Congress was responding to a pattern of discrimination by the States. The Seventh Circuit referred to two comprehensive studies of racial and national origin discrimination. The first of these studies showed there was "widespread discrimination against minorities in State governments". The Congressional record also demonstrated there was a problem with racial and gender discrimination in academia. *Nanda*, 303 F.3d at 830. Although not cited by the Seventh Circuit, the Eleventh Circuit in *In Re Employment Litigation Against the State of Alabama*, 198 F.3d 1305,1323 (11th Cir. 1999), and the Eighth Circuit in *Okruhlik v. University of Arkansas*, 255 F.3d 615, 624-25 (8th Cir. 2001) noted that one of the same studies relied upon in *Nanda*, released in 1969 by the U.S. Commission on Civil Rights, H.R. Rep. No. 92-238 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2152, concluded that "employment discrimination in State and local governments is *more pervasive* than in the private sector". *Okruhlik*'s analysis was later re-affirmed by the Eighth Circuit in *Maitland v. University of Minnesota*, 260 F.3d 959 (8th Cir. 2001), and this Court declined to re-examine that decision. __U.S. __, 122 S. Ct. 1300, 152 L. Ed. 2d 212 (2002).

The Seventh Circuit also properly relied upon this Court's observation in *Fullilove v. Klutznick*, 448 U.S. 448, 503, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980) that the knowledge Congress gains in enacting similar legislation "reduce[s] the need for fresh hearings and prolonged debates". As noted in

Okruhlik, at the same time Congress was considering the 1972 amendments to Title VII, Congress also considered and passed the Equal Rights Amendment, the Education Amendments of 1972, Pub. L. 92-318, Title IX, 86 Stat. 373, and the Equal Opportunity Act, Pub. L. No. 92-261, 86 Stat. 103. Congress held extensive hearings and received many reports detailing racial and gender discrimination by the States. Particularly pertinent here, some of the most discriminatory practices were found in State educational institutions. *See Okruhlik*, 255 F.3d at 625 for a collection of these reports. University's only answer to an avalanche of Congressional support is to argue that these studies could not have supported Title VII because Congress did not cite these studies again as a basis for enacting Title VII. As this Court recognized in *City of Boerne*, "it is for Congress to determine the method by which it will reach a decision". 521 U.S. at 531-32. University does not and cannot explain why § 5 of the Fourteenth Amendment should require Congress to repeat what it has already demonstrated is true in connection with similar legislation in order to uphold Title VII.

Finally, this Court can also look to its own litany of decisions recognizing that "those who suffer discrimination on the basis of race or gender have . . . been subjected to a history of purposeful unequal treatment" in this country. *Kimel*, 120 S. Ct. at 645. This Court has "continued to recognize the necessity of using strong remedial measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *City of Boerne*, 521 U.S. at 526. In light of this well-documented evidence of racial and gender discrimination, the Seventh Circuit was eminently correct in concluding that Congress had ample support for the exercise of its power under § 5 of the Fourteenth Amendment to enact the 1972 amendments to Title VII.

CONCLUSION

Title VII was a proper exercise of Congress' power under § 5 of the Fourteenth Amendment because it prohibits little, if any, constitutional conduct by the States. For this reason, a detailed and explicit legislative record of a pattern of unconstitutional State action was not required before Congress abrogated the States' Eleventh Amendment immunity. To the extent the Congressional record is relevant, Congress had a firm foundation upon which to extend Title VII to the States. Accordingly, the University's petition for writ of *certiorari* should be denied.

Respectfully submitted,

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